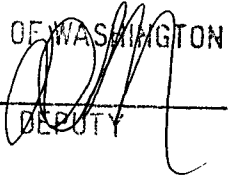


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

*42959-4-II*

COURT OF APPEALS NO. ~~45959-4-11~~

PIERCE COUNTY SUPERIOR COURT NO. 93-3-04576-9

IN THE COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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In Re the Matter of:

AMANDA L. BLANK,

Appellant,

vs.

VERNON RUSSELL BLANK,

Respondent.

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**OPENING BRIEF OF RESPONDENT/CROSS APPELLANT**

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### ***ASSIGNMENT OF ERRORS***

1. The trial Court erred and abused its discretion by finding that Russell Blank's monthly net income was \$8,195.
2. The trial Court abused its discretion by including twenty (20%) percent of Russell Blank's current wife's income, in calculating Russell Blank's gross and net income.
3. The trial Court abused its discretion by ruling that Amanda Blank was entitled to child support for Ryan Blank at any point beyond Ryan Blank's 18<sup>th</sup> birthday, due to Ryan's refusal to take affirmative steps toward graduating from high school.
4. The trial Court abused its discretion by requiring Russell Blank to pay post-secondary educational support for Ryan, based upon Ryan Blank's lack of involvement in the educational process.
5. The trial Court abused its discretion in determining that Russell Blank was responsible for his proportionate share of Ryan Blank's uninsured health care expenses beyond age 18 and in failing to determine that the health care expenses were necessary and reasonable.
6. The trial Court abused its discretion by ruling that Russell Blank was responsible for Adam Blank's post-secondary

educational expenses by failing to properly address the factors outlined in RCW 26.19.090.

7. The trial Court abused its discretion by ordering additional post-secondary educational support for Adam Blank, when Adam Blank failed to remain in good academic standing as defined by the institution and when Adam Blank was only attending school on a part-time basis.

8. The trial Court abused its discretion by requiring Russell Blank to pay uninsured health care expenses for Adam Blank after July 31, 2008 and by failing to determine that the health care expenses were necessary and reasonable.

9. The trial Court abused its discretion by failing to utilize the Child Support Schedule as contemplated in RCW 26.19.090, for the determination of post-secondary educational support.

10. The trial Court abused its discretion by failing to award Russell Blank his reasonable attorney's fees and expenses, pursuant to RCW 26.09.140.

11. The trial Court erred by failing to make findings as to Russell Blank's request for attorney's fees, based upon need and ability to pay.

12. The trial Court's denial of Russell Blank's request for attorney's fees based upon need, and the lack of a finding that Amanda Blank had the ability to pay Russell Blank's attorney's fees, pursuant to RCW 26.09.140.

***ISSUES PERTAINING TO ASSIGNMENT OF ERRORS***

1. Is the trial Court's finding that Russell Blank's monthly net income was \$8,195 supported by substantial evidence? (*Assignment of Error 1*).

2. Did the trial Court abuse its discretion by including the income of Russell Blank's new wife, in calculating the support obligation, in contravention of RCW 26.19.071? (*Assignment of Error 2*).

3. Did the trial Court abuse its discretion by ruling that Russell Blank was required to pay child support, including uninsured health care expenses, for Ryan, beyond his 18<sup>th</sup> birthday? (*Assignments of Error 3 and 4*).

4. Was the trial Court's finding that Ryan Blank was enrolled in high school, beyond Ryan Blank's 18<sup>th</sup> birthday, an abuse of discretion, when it was clear that Ryan Blank would not graduate from high school? (*Assignment of Error 3*).



5. Did the trial Court abuse its discretion by failing to properly address the factors outlined in RCW 26.19.090, in requiring post-secondary educational support for Ryan Blank? (*Assignment of Error 5*).

6. Did the trial Court abuse its discretion by failing to properly address the factors outlined in RCW 26.19.090, relating to post-secondary educational support for Adam Blank? (*Assignment of Error 6*).

7. Did the trial Court abuse its discretion by ordering additional post-secondary educational support for Adam Blank, when Adam Blank failed to remain in good academic standing, as defined by the institution, and when Adam Blank was only attending school on a part-time basis? (*Assignments of Error 7 and 8*).

8. Did the trial Court abuse its discretion by failing to utilize the child support schedule in establishing post-secondary educational support, as contemplated in RCW 26.19.090(1)? (*Assignment of Error 9*).

10. Did the trial Court abuse its discretion by failing to award attorney's fees and expenses to Russell Blank, pursuant to RCW 26.09.140? (*Assignments of Error 10, 11 and 12*).

### ***STATEMENT OF CASE***

Russell Blank and Amanda Blank divorced on December 29, 1993. They have two children. Adam Blank was born on April 17, 1989, and Ryan was born on November 11, 1991. At the time of the entry of the Order entered on December 9, 2011, CP 220, Adam Blank was 22½ years old, and Ryan Blank was 20 years old. As of December 9, 2011, Russell Blank was 64 years old, CP 963, and Amanda Blank was 47 years old, CP 703.

On July 31, 2008, Russell Blank filed his Petition for Modification of Child Support, CP 485 - 503, to adjust child support for Ryan Blank and to determine what post-secondary educational support, if any, should be paid for Adam Blank.

On December 29, 2008, Russell Blank filed a Motion for Order Setting Child Support for Ryan Blank. CP 507. In his Declaration in Support of Motion for an Order Setting Child Support, Russell Blank stated that his W-2 wages from Perler Photography were \$63,500, in 2006, and \$72,499.96, in 2007. CP 518. At the time of filing the declaration, Russell Blank noted that he received \$2,500, every two weeks, and had a net income of \$4,462.79. CP 519. Russell Blank also stated that he received additional benefits from Perler

Photograph and utilized net income of \$5,500, per month, for his net income, in his Child Support Worksheets. CP 519.

In the same declaration, Russell Blank affirmed that his wife, Leann Blank, a full time employee of Perler Photography, had W-2 wages of \$65,637.50, in 2006, and \$82,082.54, in 2007. CP 519. Russell Blank explained his health problems, at age 60, and the fact that Leann Blank works far greater hours than he to run the business. CP 519 - 520. He also noted that Leann repaid the corporation \$250, per month, to pay personal expenses that were being paid by Perler Photography. CP 519.

Russell Blank's new wife, Leann, had been involved in the photograph business for 40 years and intimately involved in Perler Photography for 15 years. CP 737. Leann Blank explained the business nature of the expenses in Perler Photography's records. CP 750 - 756. During the two busy seasons, at Perler Photography, Leann Blank works substantially more hours than Russell Blank, justifying her higher salary. CP 746.

At the time of setting the Motion for an Order Setting Child Support, Russell Blank filed his 2004 through 2007 U.S. Individual Tax Returns with W-2's, Perler Photography's 2003 through 2006

U.S. Corporation Income Tax Returns, Profit & Loss Statements through November, 2008, Perler Photography Payroll Transaction Detail through June, 2008, Health Care Information, and Amanda Blank's W-2's for 2004 through 2007, inclusive. CP 4 - 110.

The Perler Photography Profit & Loss previous year comparison, through November 19, 2008, established that sales for the corporation had decreased by \$133,894.14. CP 91. The Profit & Loss Statement also established a net loss of \$27,242.47, as of November 19, 2008. CP 92. The U.S. Corporation Income Tax Return, for the period from July 1, 2007 through June 30, 2008, established a loss for Perler Photography totaling \$49,910 for the fiscal year. CP 81 - 88.

Russell Blank affirmed that all of his business and personal credit cards were at their maximum limits. CP 958. Russell Blank's home and his Arizona condominium had substantial negative equities. CP 959. Russell Blank stated that Perler Photography had debt in excess of \$220,000, the business line of credit was at its maximum, and he and his wife had taken out two additional bank loans totaling \$80,000, to meet expenses. CP 959. Amanda Blank's W-2 for 2007 showed annual earnings of \$87,797.91. CP 107. After

deducting federal income tax, social security, medicare tax, and \$166.67 for Amanda's pension, Russell Blank determined that Amanda Blank's net monthly income was \$5,847.94. CP 522.

In her Financial Declaration, dated February 17, 2009, CP 703 - 709, Amanda Blank stated that her net income on a monthly basis was \$4,518.33. Amanda Blank declared that her total monthly household expenses were \$6,092.50.

Ryan Blank's high school transcript established his grades for the periods ending as follows: June 2008 four failures; January 2009 five failures, a "D" and a "D+"; April 2009 no credit in four classes; June 2009 one "F" and no credit in three classes; January 2010 two "F's" and two no credits out of five classes; March 2010 two classes enrolled, one no credit and one "F"; June 2010 five "F's" out of six classes; October 2010 two classes, one no credit; December 2010 two classes, one "F"; March 2011 four "D's" and one no credit out of six classes; high school and beyond plan not met; culminating project not met. CP 325 - 326. As of the date of the transcript, April 22, 2011, Ryan Blank was 19½ years old. Russell Blank paid child support for Ryan Blank, based upon representations that Ryan Blank was enrolled as a full-time student. CP 1488. From January 2008

through December 2010, Ryan Blank was enrolled in thirty-eight classes, and failed or received no credit in twenty-seven of those classes. CP 1488. Ryan Blank took two classes the winter quarter of 2010, at Pierce College, and failed both classes. CP 1489. Ryan Blank enrolled at College Park Vocational School, and Russell Blank was not consulted. CP 1490. Amanda Blank incurred substantial expenses for a tool box, tools, and car parts without input from Russell Blank. CP 1490. Amanda Blank did not consult Russell Blank, relating to uninsured health care expenses. CP 1484.

In regard to post-secondary educational support for Adam Blank, Amanda Blank unilaterally decided to enroll Adam Blank at the University of Idaho, even though he had been accepted in state. CP 743. Russell Blank paid post-secondary educational support for Adam Blank, based upon in-state tuition. CP 744. Adam Blank failed all classes at the University of Idaho. CP 961. Neither Amanda Blank nor Adam Blank completed the FAFSA Form nor was there any evidence indicating an attempt to obtain scholarships, grants, loans, or any other form of financial aid. CP 744. No application was grants, scholarships, loans, or any other financial aid was submitted by Amanda Blank or Adam Blank for the period of time from 2008

through 2011, inclusive. CP 2165.

Beginning in the winter term of 2009, Adam Blank withdrew from two classes and received a "D" in remedial arithmetic. In the spring of 2009, Adam Blank failed general psychology and had a grade point of 1.7. In the fall of 2009, Adam Blank repeated Introduction to Algebra. In winter, 2010, Adam Blank repeated general psychology but did not receive a grade. In spring, 2010, Adam Blank failed Introduction to Composition. In the summer of 2010, Adam Blank's grade point average was 1.9. In the fall of 2010, Adam Blank took English Composition I and received a "D-" and retook the same class in the winter of 2011 and received a "D." In the winter term of 2011, Adam Blank received an "F" in Math for Elementary Education I and had a grade point of .83. CP 1761. From the time that Adam enrolled at Pierce College, Adam Blank never earned greater than 10 credits, with a full-time student being 12 credits. CP 2166. Adam Blank failed Math for Elementary Education I for a second time. CP 2166. From the winter quarter of 2009 through the fall quarter of 2011, Adam Blank had retaken six classes, at Pierce College. CP 2166. Of the classes taken by Adam Blank, at Pierce College, from 2009 through 2011, nine of the classes were remedial classes, below

the 100 level. CP 2167.

Amanda Blank made several requests for Russell Blank to produce financial records. On March 13, 2009, Russell Blank's attorney filed a declaration outlining the documents that had been produced, as a result of the requests for documents. CP 757 - 796.

Based upon an anonymous contact, Perler Photography was subjected to an Internal Revenue Service audit to look at the wages of the officers and personal expenses attributable to the owners of Perler Photography. The audit addressed the fiscal years of 2008 - 2009 and 2009 - 2010 and was concluded on October 28<sup>th</sup>, 2011. CP 2201. Perler Photography paid its accountant \$7,500 for the audit, which audit resulted in no finding of additional tax liability on a corporate or personal level. CP 2202.

Based upon cross Motions for Revision, Judge Worswick entered an Order of Child Support Final Order on May 22, 2009, and Judge Worswick denied the requests of both parties for an award of attorney's fees. CP 1062 - 1075.

Amanda Blank appealed. CP 2214 - 2246.

Through an unpublished decision, this Court vacated the Order of Child Support Final Order, and the Court remanded the proceeding



to the trial Court below to issue findings, relating to the calculation of income. This Court denied both parties requests for attorney's fees. CP 2247 - 2255.

On remand, the Honorable Elizabeth P. Martin readdressed the cross Motions for Revision of the Court Commissioner's ruling, which had previously been ruled upon by Judge Worswick. CP 2040.

In addition, on remand, the parties agreed to have the Court address post-secondary educational support for both Adam Blank and Ryan Blank. CP 2062 - 2063; RP (April 29, 2010) 40.

### ***ARGUMENT***

#### **A. Standard of Review.**

A modification of child support is reviewed for a manifest abuse of discretion. *In re: Marriage of McCausland*, 159 Wn.2d 607, 616, 152 P.3d 1013 (2007). A trial Court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

The standard of review is whether the findings are supported by substantial evidence and whether the trial Court has made an error of law that may be corrected upon appeal. *In re: Marriage of Stern*,

68 Wash.App. 922, 846 P.2d 1378 (1993).

**B. The lower Court abused its discretion by establishing Russell Blank's monthly net income at an amount greater than permitted by RCW 26.19.071.**

In calculating child support, the Court is to consider all income and resources of each parent's household. RCW 26.19.071(1). Only the parent's income is used in calculating the basic support obligation. RCW 26.19.071(1); *In re Marriage of Trichak*, 72 Wash.App. 21, 863 P.2d 585 (1993). When setting child support, the trial Court must first compute the total income of the parents (RCW 26.19.071(1)); determine the standard child support from the economic table (RCW 26.19.020); decide whether to deviate from the standard calculation, based upon consideration of the statutory factors (RCW 26.19.075); and allocate each parent's support obligation (RCW 26.19.080). *In re: Marriage of Crosetto*, 82 Wash.App. 845, 919 P.2d 954 (1996).

As provided in RCW 26.19.071(1), all income and resources of each parent's household shall be disclosed and considered by the Court when the Court determines the child support obligation of the parents. Only the income of the parents of the child whose support is at issue shall be calculated for purposes of calculating the basic

support obligation. Income and resources of any other person shall not be included in calculating the basic support obligation. In determining income, the parties are required to provide tax returns for the preceding two years and current pay stubs to verify income and deductions. Other sufficient verifications shall be required for income and deductions which do not appear on tax returns or pay stubs. In that regard, Russell Blank provided his U.S. Individual Income Tax Returns and his U.S. Corporation Income Tax Returns and Profit & Loss Statements for Perler Photography, from 2004 through 2010, inclusive. CP 4 - 110, CP 410 - 427.

Although the trial Court is not permitted to utilize the income of any other person in calculating the basic child support obligation, the Court included twenty-five percent of Russell Blank's wife's net income, as income to Mr. Blank. CP 41, 42, 47 and 50. The Court utilized Leann Blank's W-2 gross wages of \$76,249 and attributed one quarter of Leann Blank's wages to Mr. Blank in calculating child support. CP 42. Even though the trial Court acknowledged that Leann Blank worked for Perler Photography on a full-time basis, the Court included the sum of \$1,588.52 on line 1c of Washington State Child Support Schedule Worksheets, as part of Russell Blank's gross

income. CP 42 and 47. As acknowledged by the trial Court at the hearing on August 5, 2011, the trial Judge specifically stated that she could not consider the income of the wife in terms of an obligation to provide support. CP 98. The trial Court erred by including twenty-five percent of Leann Blank's earned income as part of Russell Blank's income, in determining the child support obligation.

The Court made an additional finding that a total of \$19,102.28 was charged by Russell Blank (and/or Leann Blank) to business credit cards and the business checking account for Petitioner's personal expenses on an annualized basis for the calendar 2008. CP 42. The trial Court states that the actual figures are found in paragraph 19 of Amanda Blank's declaration dated February 17, 2009. CP 607 - 609. Without identifying which expenses the trial Court deemed to be personal expenses, the trial Court found that the \$19,102.28 represented Russell Blank's one-half community share of the personal expenses, for a value of \$1,591.86, per month, business income imputable to Russell Blank. Added to the amount was a personal expense for the vehicle expense, for a total of \$1,757.10. CP 42. Without having identifying those expenses which the trial Court deemed personal expenses paid by the corporation, the trial

Court erred in utilizing the sum of \$1,757.10, on line 1e of the Washington State Child Support Schedule Worksheets, which resulted in Russell Blank's gross income being overstated.

**C. The lower Court abused its discretion by requiring Russell Blank to pay child support for Ryan Blank beyond June, 2010, Ryan Blank's anticipated date of graduation from high school.**

In addressing the issue of child support, the lower Court shall order either above parents owing a duty to support to any child of the marriage dependent upon either or both spouses to pay an amount of child support determined under Chapter 26.19 RCW. RCW 26.09.100(1). A "dependent" is one who looks to another for support and maintenance and relies on another for the reasonable necessities of life. *Childers v. Childers*, 89 Wn.2d 592, 575 P.2d 201 (1978). When dependency ends is a factual determination to be determined from the surrounding circumstances, such as the child's needs, prospects, desires, aptitudes, abilities and disabilities, the parents' level of education, standard of living, current and future resources, and the amount and type of support the child would have been afforded if the parents had not divorced. *In re: Marriage of Anderson*,

49 Wash.App. 867, 746 P.2d 1220 (1987). As stated in *Anderson*, supra, many of the factors, relating to dependency and post-secondary educational support, cannot be foreseen or evaluated when the Decree is entered. *Marriage of Anderson*, supra, page 872. For example, it could not have been foreseen that Ryan Blank would show such total disregard for his high school education, under the care of Amanda Blank. CP 56 - 58.

Ryan Blank turned 18 on November 11, 2009, which was the fall term of his senior year, and if he had graduated on track, he would have graduated in June 2010. CP 56. As stated by the trial Court, it was clear that by the time Ryan Blank was a sophomore, he was in deep trouble academically. He had many classes that he did not pass and many classes for which he received no credit. CP 57. In January, 2010, Ryan enrolled at Pierce College, and he received no credits. CP 57. The trial Court went on to state that for the spring term of 2010 Ryan Blank did on-line school, for which he failed all classes but one. In June, 2010, when Ryan Blank should have graduated from high school, he received five failing grades out of six classes taken. CP 325 - 326.

The trial Court then went on to state that Ryan Blank was back

on track in the fall of 2010 and that child support would resume as of September 2010. CP 59. What the Court failed to acknowledge was that with the grading periods for October and December 2010, Ryan Blank only took four classes and received no credit for one of the courses and received an "F" in one of the other courses. CP 325 - 326. The March, 2011 grades for Ryan Blank included four "D's" and one no credit out of six classes taken. CP 325 - 326. From the period of time that Ryan Blank turned age 18, Ryan Blank exhibited no effort or intention of graduating from high school. Based upon Ryan Blank's refusal to take affirmative steps to complete his high school education, at age 18, Ryan Blank was no longer dependent and became emancipated. Ryan Blank's prospects, aptitudes and abilities, as of June, 2010 reflected a desire to take no further responsibility for his educational endeavors. Because Ryan Blank was no longer dependent as of June, 2010, the trial Court erred in requiring Russell Blank to pay continued child support for Ryan Blank.

The above analysis, relating to Ryan Blank's dependency, also applies to the Court's order that Russell Blank was required to contribute to unreimbursed extraordinary health care payments for Ryan Blank in the amount of \$1,353.38, plus interest of \$230.31. As

of the date of the filing of the Petition for Modification of Child Support, RCW 26.19.080(2) provided that ordinary health care expenses were included in the economic table and monthly health care expenses that exceeded five percent of the basic support obligation were to be considered extraordinary health care expenses. Extraordinary health care expenses were required to be shared by the parents in the same proportion as the basic child support obligation. RCW 26.19.080. Section 4 of the statute provides that the trial Court may exercise its discretion to determine the necessity for and the reasonableness of all amounts ordered in excess of the basic child support obligation. At no time did the trial Court determine the necessity of the health care expenses for Ryan Blank nor did the trial Court ever determine the reasonableness of all of the amounts ordered. Because Ryan Blank was no longer dependent as of November, 2009, or June, 2010, and because the Court erred in failing to determine the necessity and reasonableness of the uninsured health care expenses, the case should be remanded for an appropriate determination of the necessity of the expenses and what expenses are owed, if any. It should be noted that Russell Blank had been making payments toward the uninsured health care expenses



for Ryan. CP 159.

Above and beyond the requirement that the trial Court is required to determine that the extraordinary health care expenses are necessary and reasonable, the Court must consider each parent's ability to share those expenses, in light of their economic circumstances and in light of their total child support obligation. RCW 26.19.065(1), .075, .001; *Marriage of McCausland*, 129 Wn.App. 390, 118 P.3rd 944 (2005). The trial Court erred in failing to address Russell Blank's ability to share in the uninsured health care expenses in light of his total child support obligation, including post-secondary educational support for Adam Blank, and the fact that Ryan Blank was over the age of 18 and was not actively pursuing an educational program.

**D. The lower Court abused its discretion by requiring Russell Blank to contribute to Ryan Blank's post-secondary educational support.**

In establishing the standards for post-secondary educational support, RCW 26.19.090 provides as follows:

(1) The child support schedule shall be advisory and not mandatory for post-secondary educational support.

(2) When considering whether to order support for post-secondary educational expenses, the Court shall determine whether the child is in fact dependent and is relying upon the parents for the reasonable necessities of life. The Court shall exercise its discretion when determining whether and for how long to award post-secondary educational support based upon consideration of factors that include but are not limited to the following: Age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the post-secondary education sought; and the parents' level of education, standard of living, and current and future resources. Also to be considered are the amount and type of support that the child would have been afforded if the parents has stayed together.

(3) The child must enrolled in an accredited academic or vocational school, must be actively pursuing a course of study commensurate with the child's vocational goals, and must be in good academic standing as defined by the institution. The court-ordered post-secondary educational support shall be automatically suspended during the period or periods the child fails to comply with these conditions.

The final Order of Child Support, entered on December 3, 2004, at paragraph 3.14, provided for post-secondary educational support, as follows: the parents shall pay for the post-secondary educational support of the children. Post-secondary support provisions will be decided by agreement or by the Court. CP 468. The same language had been incorporated into the prior orders for

support, including the order entered on December 29, 1993, at which time, Adam Blank was four years old and Ryan Blank was two years old. As stated in a myriad of cases, a child's ability and aptitude for college could not have been known, at a child's young age, when an original Order of Child Support was entered. *In re: Marriage of Kelly*, 85 Wash.App. 785, 934 P.2d 1218 (1997). Conversely, the lack of a child's abilities and a lack of aptitude for post-secondary education could not have been known at the time of the entry of the initial Order of Child Support, when Adam Blank was four years of age and Ryan Blank was two years of age.

At the time of the entry of the order dated December 9, 2011 (CP 2207), Ryan Blank was twenty years old. Ryan Blank continued to use drugs while residing with Amanda Blank and refused to take any responsibility for his health care issues. CP 747, 1483. As stated in the prior section, Ryan Blank's involvement in the educational process was abysmal. As stated by the trial Court, enrollment in the educational process is something more than just simply signing up. The Court acknowledged that Ryan Blank received no credit for the Pierce College Running Start Program, in the winter of 2010. For the spring term of 2010, Ryan Blank received one credit on-line, i.e., P.E.,

and he failed all other classes. CP 2120. The Court also stated that Ryan Blank did nothing over the summer of 2010 to further his education. CP 2091.

As noted by the trial Court, Ryan Blank's needs as a student, were no-existent, after he turned age 18, since he was not actively pursuing a high school diploma. CP 2120. In the fall of 2010, Ryan attended Clover Park Technical College, where he withdrew from one class and received "D's" in the other four classes that he took, for a grade point average of 1.00. Ex 6, June 9, 2011. As indicated in his high school career, Ryan Blank had minimal prospects, desires, aptitudes, and/or abilities to pursue a post-secondary education. CP 325 - 326. The lack of prospects, desires, aptitudes, and abilities is further born out by Ryan Blank's lack of commitment and progress at Pierce County and at Clover Park Vocational School. CP 1488 - 1490. In addressing post-secondary educational support, the trial Court failed to address the level of education of the parties, the standard of living of both parties, and the current and future resources available to Russell Blank to accommodate ongoing educational support for an adult, who had no ability or motivation to complete his high school education or any post-secondary educational program.

RCW 26.19.090(3) requires that Ryan Blank be actively pursuing a course of study and that he be in good academic standing. The transcript from Clover Park Technical College for the fall term of 2010 and the winter term of 2011 establishes that Ryan Blank was not actively pursuing a course of study, and he was not in good academic standing with the institution. Ex 6, June 9, 2011. Even if the trial Court had substantial evidence to consider post-secondary educational support for Ryan Blank, all post-secondary educational support should have been suspended, as of July 1, 2010, due to Ryan Blank's failure to be actively pursuing a course of study, and Ryan Blank's failure to be in good academic standing.

In regard to the Child Support Schedule, RCW 26.19.090(1), provides that the Child Support Schedule shall be advisory and not mandatory for post-secondary educational support. As indicated by Russell Blank, the standard calculation for his child support obligation, utilizing the Child Support Schedule, based upon the Court's income determinations (which Russell Blank disputes), was \$1,199.53. CP 2164. The Court's final order resulted in Russell Blank having a child support obligation for Ryan Blank and post-secondary educational support obligations for Ryan Blank and Adam Blank of \$1,756.68, per

month, over the course of thirty-seven months. CP 2165. The trial Court erred in failing to consider the Child Support Schedule, prior to establishing Russell Blank's obligations for the support of his two adult sons. The failure to consider the Child Support Schedule is another instance where the trial Court neglected to address the actual impact of the Court's order on Russell Blank, specifically relating to his current and future resources. Moreover, the trial Court never considered or addressed Amanda Blank's current and future resources, including the financial benefits she received from her significant other/attorney, Nelson Berry.

**E. Based upon the evidence presented to the Court, the lower Court abused its discretion by requiring Russell Blank to contribute to Adam Blank's post-secondary educational support.**

The statutory standards for post-secondary educational support, pursuant to RCW 26.19.090, are outlined in Section D above. Although the factual situation, relating to Adam Blank's post-secondary educational support, is different than the factual situation relating to Ryan Blank, the legal analysis is similar in many ways. For example, it was impossible for the parties to determine the lack of

Adam Blank's ability and lack of aptitude for post-secondary education, in 1993, when Adam Blank was four years old. Moreover, the trial Court failed to address the level of education of the parties, the standard of living of both parties, and the current and future resources available to the parties. Failure to take the above matters into consideration coincides with the trial Court's failure to consider the Child Support Schedule, prior to establishing Russell Blank's obligations for Adam Blank's post-secondary educational support.

After Adam Blank failed his courses at the University of Idaho, he enrolled at Pierce College, for the winter term of 2009. Adam Blank had been accepted at in-state colleges, but Amanda Blank and Adam Blank refused to consider community college or in-state colleges. CP 743. In the winter term of 2009, Adam Blank took College Success, for which he received no credit and was a class that he repeated. In the same term, Adam Blank took Fundamentals of Arithmetic a level 051 course and received a "D+" in that class. Adam Blank also took Reading Skills Improvement, a level 055 course, and he withdrew from that class. He earned five credits during the winter 2009 term, which is less than full-time status and had a grade point average of 1.3. Ex 7, June 9, 2011.

In the spring term of 2009, Adam Blank enrolled in Introduction to Communications, at Pierce College and received a grade of 3.1. He also took Pre-Algebra, a level 054 course, for which he received 2.0 grade. He also took General Psychology and received a grade point of 0. His grade point for the spring 2009 term was 1.7, and he earned 10 credits. Ex 7, June 9, 2011. Adam Blank took Public Speaking and Introduction to Theater in the fall of 2009 and received 4.0 grades in both courses. He also took Introduction to Algebra, a level 060 course, for which he received a 0, and the course was repeated. Again Adam Blank was not enrolled on a full-time basis, from the perspective of credits earned. Ex 7, June 9, 2011.

In the winter of 2010, Adam Blank repeated College Success and received a 3.3 grade. He also repeated Introduction to Algebra, a 060 level course, and received a 1.3 grade in that course. Adam Blank also repeated General Psychology and received no grade in that class. Adam Blank earned eight credits during the winter 2010 term. Ex 7, June 9, 2011.

In the spring of 2010, Adam Blank took Introduction to Early Child Education and received a 3.0 grade. Adam Blank also took Introduction to Composition, a level 099 course, and received no



grade in that class and subsequently repeated the course. Adam Blank also took Intermediate Algebra, a 098 level course, and received a 1.0 grade. In the summer of 2010, Adam Blank took Fundamental Digital Photography and received a grade of 1.7. He received a pass in Field Experience. He repeated Introduction to Composition, a level 099 course, for which he received a grade of 2.1. His grade point average for twelve credits earned was 1.9.

In the fall of 2010, Adam Blank took English Composition, for which he received a grade of 0.8. He also took Professional Development and received a grade of 3.6. Adam Blank completed Introduction to Sociology and received a grade of 1.8. He earned fifteen credits and had a grade point average of 2.07. Ex 7, June 9, 2011.

In the winter term of 2011, Adam Blank took Survey of Biology and received a grade of 1.5. In the same term, Adam Blank took English Composition which was a repeat of the class he had taken in the fall of 2010, and he received a grade of 1.0. Adam Blank also took Math for Elementary Education and received a 0.0 grade. During the winter, 2011, Adam Blank earned ten credits and received a grade point average of 0.83. Adam Blank's accumulative grade point

average at the completion of the winter, 2011 term was 1.94. Ex 7, June 9, 2011.

In the spring term of 2011, Adam Blank took Survey of Environmental Science and received a grade of 1.4. Adam Blank also repeated Math for Elementary Education 1 and received a 0.0 grade. In the same term, Adam Blank took General Psychology for the third time and received a grade of 3.0. Adam Blank's grade point average for the winter term was 1.47, and he had credits earned at ten credits earned. CP 1873.

At the time of the entry of the final order in December 2011, Adam Blank was 22½ years old. As of that date, he had not completed credits for an Associates Degree, after commencing his post-secondary education in September, 2008. As evidenced by Adam Blank's official transcript, from Pierce College, Adam Blank's prospects within the academic arena were extremely limited. Ex 7. Adam Blank's desire to be an elementary school teacher is commendable, but after three years of education, he was unable to obtain a grade above a "D" in English Composition, a level 101 course and failed for Elementary Education twice. Ex 7, CP 1873. Adam Blank was never able to take a full load of classes and meet the

requirements of the educational institution from the time that he commenced the post-secondary educational process. Adam Blank's aptitude and abilities have been suspect since before he entered post-secondary education process, and his inability to perform has been borne out over the course of the last 3½ years.

Pursuant to RCW 26.19.090(3), the record does reflect that Adam Blank was enrolled in an accredited academic school. The record also reflects that Adam Blank appeared to be actively pursuing a course of study, but his official transcript establishes that but for the fall of 2010, Adam Blank never earned greater than twelve credits in any term. Ex 7. It is also known that Adam Blank failed all classes at the University of Idaho and in his first term at Pierce College, he earned five credits and had a grade point average of 1.3. After failing all courses at the University of Idaho, Adam Blank's post-secondary educational support was required to be suspended automatically. RCW 26.19.090(3). Moreover, the post-secondary educational support of both parents should have been suspended through the entry of the final order, since Adam Blank's accumulative grade point average, as of the completion of the winter term, 2011, was 1.94. Ex 7. The trial Court erred in requiring Russell Blank to pay post-

secondary educational support for Adam Blank. Therefore, the Amended Final Order of Child Support, dated September 8, 2011, should be amended to reflect that Russell Blank is not responsible for Adam Blank's post-secondary education expenses. Even if post-secondary educational support was to be ordered, the support obligation should have been suspended from January, 2009, through the entry of the Court's order, since Adam Blank was never in good academic standing as defined by the institution and was never a full time student.

**F. The lower Court abused its discretion by failing to award reasonable attorney's fees to Russell Blank, based upon need and ability to pay, pursuant to RCW 26.09.140.**

Pursuant to RCW 26.09.140, the Court, after considering the financial resources of both parties, may order a party to pay any reasonable amount for the cost to the other party of maintaining or defending any proceeding under RCW 26.09 and for reasonable attorney's fees in connection with the action. RCW 26.09.140. The statute allows the trial Court to award reasonable attorney's fees to either party, but the Court must first consider the financial situation of both parties. RCW 26.09.140. The award is discretionary, and the

party contesting the award of attorney's fees has a burden to show that the trial Court abused its discretion. *In re: Marriage of Knight*, 75 Wn.App. 721, 800 P.2d 71 (1994).

In its order dated April 29, 2011, the trial Court specifically denied both parties requests for attorney's fees. CP 1548. The Court's findings relating to the denial of attorney's fees were outlined in the Court's written decision, dated March 22, 2011, which written decision was incorporated into the order. CP 1559 - 1560. The trial Court goes into a lengthy discussion relating to the denial of the request for attorney's fees by Amanda Blank, but the only mention of Russell Blank's request for attorney's fees is that the Court finds that each party should bear their own fees. CP 1560.

The Amended Final Order of Child Support Nunc Pro Tunc following reconsideration, dated September 8, 2011, specifically provides at paragraph 3.22 as follows:

- (1) Both parties' request for attorney's fees are denied.
- (2) In particular, the Court finds that the Petitioner/Father did not commit fraud and was not intransigent in reporting his income to this Court for the reasons set forth in Exhibit 1.

(3) In addition, the Court finds that the Petitioner/Father does not have the ability to attorney's fees to the Respondent/Mother, as required by RCW 26.09.140. CP 2030.

Consistent with the Court's order entered on April 29, 2011, the Court's written decision dated March 22, 2011, was incorporated into the Amended Final Order of Child Support Nunc Pro Tunc following reconsideration. CP 2040 - 2050. As with all of the rulings, relating to Russell Blank's requests for an attorney of reasonable attorney's fees, the trial Court failed to address Amanda Blank's assets, debts, or other household income, including the income of Adam Blank, Ryan Blank, and the financial benefits received by Amanda Blank from her significant other of over one decade, Nelson Berry. Although the trial Court made specific findings about the denial of an award of attorney's fees to Amanda Blank, the trial Court merely stated that the requests by Russell Blank for attorney's fees was denied. The trial Court must provide sufficient Findings of Fact and Conclusions of Law to develop an adequate record for appellate review of a fee award or a denial of fees. *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998). Therefore, the Appellate Court should remand this matter for a new hearing on Russell Blank's

request for attorney's fees, based upon adequate information and for entry of specific Findings of Fact and Conclusions of Law regarding any award of attorney's fees to Russell Blank, based upon his need and Amanda Blank's ability to pay.

In regard to Amanda Blank's request for attorney's fees, the trial Court made specific findings, relating to the denial of an award of attorney's fees to Amanda Blank. CP 2043 - 2044. A Court may award attorney's fees on the basis that one party's intransigence caused the other to incur additional legal fees. *In re: Marriage of Bobbitt*, 135 Wn.App. 8, 144 P.3d 306 (2006). Attorney fees based on intransigence have been awarded where a party engaged in obstruction and foot-dragging or made the proceeding unduly difficult. The trial Court made specific findings that Russell Blank did not engage in fraud or intransigence. CP 2044. In addressing the factors of RCW 26.09.140, relating to Amanda Blank's request for attorney's fees, the Court addressed specific findings that Russell Blank did not have the ability to pay the requested fees nor did Amanda Blank have the need. CP 2044. The trial Court's findings are supported by substantial evidence, as outlined in the Declaration of Russell Blank, dated April 30, 2009. CP 957 - 969.

**G. Pursuant to RAP 18.1, Russell Blank should be awarded attorney's fees on appeal.**

RAP 18.1 allows a party to seek attorney's fees on appeal if a statute grants the right to recover said fees. RAP 18.1. Under RCW 26.09.140, the Appellate Court may order a party to pay the costs and attorney's fees of the other party on appeal. In determining whether to award fees, the Appellate Court should consider the parties relative ability to pay and the arguable merit of the issues raised on appeal. *In re: Marriage of Muhammaad*, 153 Wn.2d, 108, P.3d 779 (2005). Based upon Russell Blank's need for the payment of his attorney's fees, and based upon Amanda Blank's ability to pay said fees, Russell Blank requests that he be awarded attorney's fees on appeal. RAP 18.1, RCW 26.09.140.

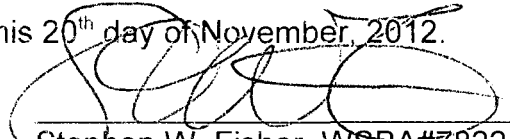
**H. Relief requested by Russell Blank.**

Based upon the foregoing, Russell Blank requests that this Court deny Amanda Blank's appeal. Russell Blank requests that this Court remand this case to the trial Court to properly address Russell Blank's income for purposes of child support, his obligation to pay post-majority support for Ryan Blank and Adam Blank, and Russell



Blank's request for attorney fees.


Respectfully submitted this 20<sup>th</sup> day of November, 2012.

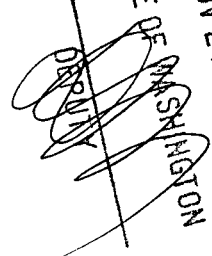
  
Stephen W. Fisher, WSBA#7822  
Attorney for Respondent

**CERTIFICATE OF SERVICE**

I certify that on the 20<sup>th</sup> day of November, 2012, I mailed a true and accurate copy of the foregoing Opening Brief of Respondent/Cross Appellant, by first class mail, postage prepaid, to:

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